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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DON W. TRUJILLO,	)	NO. EDCV 06-827-CT
	)	
Plaintiff,	)	OPINION AND ORDER
	)	
v.	)	
	)	
JO ANNE B. BARNHART,	)	
COMMISSIONER, SOCIAL SECURITY	)	
ADMINISTRATION,	)	
	)	
Defendant.	)	
	)	
	)	

For the reasons set forth below, it is ordered that judgment be entered in favor of defendant Commissioner of Social Security ("the Commissioner") because the Commissioner's decision is supported by substantial evidence and is free from material legal error.

SUMMARY OF PROCEEDINGS

On August 15, 2006, plaintiff, Don W. Trujillo ("plaintiff"), filed a complaint seeking judicial review of the denial of benefits by the Commissioner pursuant to the Social Security Act ("the Act"). The parties filed a consent to proceed before the magistrate judge. On November 13, 2006, plaintiff filed a brief in support of the complaint. On December 12, 2006, the Commissioner filed a brief in opposition to plaintiff's request for relief.

SUMMARY OF ADMINISTRATIVE RECORD

1. Proceedings

On April 30, 2002, plaintiff filed an application for Supplemental Security Income ("SSI"), alleging disability since 1995 due to severe depression, hearing voices with visions, anxiety and left leg muscle wasting. (TR 76, 77-79, 85).<sup>1</sup> The application was denied initially and upon reconsideration. (TR 37, 42).

On December 11, 2002, plaintiff filed a request for a hearing before an administrative law judge ("ALJ"). (TR 49). On October 15, 2003, plaintiff, represented by an attorney, appeared and testified before an ALJ. (TR 251-267). On November 6, 2003, the ALJ issued a decision that plaintiff was not disabled, as defined by the Act, and thus was not eligible for benefits. (TR 29-36). Plaintiff filed a request with the Social Security Appeals Council to review the ALJ's decision and on August 27, 2004 the Appeals Council remanded the case to the ALJ ordering the ALJ on remand to (1) consider evidence from the San Bernardino County Department of Behavioral Health for the period from May 2003 to June 2003 and (2) further evaluate plaintiff's subjective complaints and consider the statement of plaintiff's sister. (TR 63-64).

On January 13, 2006, plaintiff, represented by an attorney, appeared and again testified before an ALJ. (TR 268-287). The ALJ also considered vocational expert ("VE") testimony. On March 29, 2006, the ALJ issued a decision that plaintiff was able to perform a range of light work limited to simple, routine, repetitive tasks and that, given

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<sup>1</sup> "TR" refers to the transcript of the record of administrative proceedings in this case and will be followed by the relevant page number(s) of the transcript.

1 this functional capacity, plaintiff could perform jobs that existed in  
2 significant numbers in the economy. (TR 16). Accordingly, the ALJ  
3 found that plaintiff was not disabled, as defined by the Act, and thus  
4 was not eligible for benefits. (Id.) On April 6, 2006, plaintiff filed  
5 a request with the Social Security Appeals Council to review the ALJ's  
6 decision. (TR 8). On June 29, 2006, the request was denied. (TR 5-7).  
7 Accordingly, the ALJ's decision stands as the final decision of the  
8 Commissioner. Plaintiff subsequently sought judicial review in this  
9 court.

## 10 2. Summary Of The Evidence

11 The ALJ's March 29, 2006 decision (TR 12-17) and the prior November  
12 6, 2003 decision (TR 29-36) incorporated therein, except as otherwise  
13 noted, materially summarize the evidence in the case.

### 14 PLAINTIFF'S CONTENTIONS

15 Plaintiff contends as follows:

- 16 1. The ALJ failed to properly consider the opinions of the  
17 consultative psychiatric examiner, Dr. Divy Kikani;
- 18 2. The ALJ failed to pose a complete hypothetical to the VE;
- 19 3. The ALJ failed to comply with the remand order of the Appeals  
20 Council by not properly considering the lay witness testimony; and,
- 21 4. The ALJ incorrectly asserted that plaintiff's failure to obtain  
22 treatment suggests that his impairments are not severe.

### 23 STANDARD OF REVIEW

24 Under 42 U.S.C. §405(g), this court reviews the Commissioner's  
25 decision to determine if: (1) the Commissioner's findings are supported  
26 by substantial evidence; and, (2) the Commissioner used proper legal  
27 standards. Macri v. Chater, 93 F.3d 540, 543 (9th Cir. 1996).

1 Substantial evidence means "more than a mere scintilla," Richardson v.  
2 Perales, 402 U.S. 389, 401 (1971), but less than a preponderance.  
3 Sandgate v. Chater, 108 F.3d 978, 980 (9th Cir. 1997).

4 When the evidence can reasonably support either affirming or  
5 reversing the Commissioner's conclusion, however, the Court may not  
6 substitute its judgment for that of the Commissioner. Flaten v.  
7 Secretary of Health and Human Services, 44 F.3d 1453, 1457 (9th Cir.  
8 1995). The court has the authority to affirm, modify, or reverse the  
9 Commissioner's decision "with or without remanding the cause for  
10 rehearing." 42 U.S.C. §405(g).

#### 11 DISCUSSION

##### 12 1. The Sequential Evaluation

13 A person is "disabled" for the purpose of receiving social security  
14 benefits if he or she is unable to "engage in any substantial gainful  
15 activity by reason of any medically determinable physical or mental  
16 impairment which can be expected to result in death or which has lasted  
17 or can be expected to last for a continuous period of not less than 12  
18 months." 42 U.S.C. §423(d)(1)(A).

19 The Commissioner has established a five-step sequential evaluation  
20 for determining whether a person is disabled. First, it is determined  
21 whether the person is engaged in "substantial gainful activity." If so,  
22 benefits are denied.

23 Second, if the person is not so engaged, it is determined whether  
24 the person has a medically severe impairment or combination of  
25 impairments. If the person does not have a severe impairment or  
26 combination of impairments, benefits are denied.

27 Third, if the person has a severe impairment, it is determined  
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1 whether the impairment meets or equals one of a number of "listed  
2 impairments." If the impairment meets or equals a "listed impairment,"  
3 the person is conclusively presumed to be disabled.

4 Fourth, if the impairment does not meet or equal a "listed  
5 impairment," it is determined whether the impairment prevents the person  
6 from performing past relevant work. If the person can perform past  
7 relevant work, benefits are denied.

8 Fifth, if the person cannot perform past relevant work, the burden  
9 shifts to the Commissioner to show that the person is able to perform  
10 other kinds of work. The person is entitled to benefits only if the  
11 person is unable to perform other work. 20 C.F.R. §§404.1520, 416.920;  
12 Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).

13 2. Issues

14 A. Consultative Examiner's Opinion

15 Plaintiff contends that the ALJ failed to properly consider the  
16 opinions of Dr. Divy Kikani, who performed a psychiatric consultative  
17 examination of plaintiff on June 10, 2002.

18 Dr. Kikani diagnosed plaintiff with a "mood disorder, not otherwise  
19 specified" and gave a secondary diagnosis of "polysubstance abuse,  
20 alcohol, marijuana and speed. Needs to be objectively verified." (TR  
21 181). While Dr. Kikani gave plaintiff a "current" global assessment of  
22 functioning ("GAF") score of 50 on the examination date, which indicates  
23 severe, borderline moderate, symptoms,<sup>2</sup> Dr. Kikani found that plaintiff  
24 showed only moderate impairment in social functioning, and mild to

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26 <sup>2</sup> American Psychiatric Association, Diagnostic and  
27 Statistical Manual of Mental Disorders p. 34 (4th ed., Text  
28 Revision, 2000 ("DSM-IV-TR")).

1 moderate impairment in daily activities of living, mild to moderate  
2 impairment in concentration, persistence and pace, mild to moderate  
3 impairment in ability to carry out complex instructions and moderate  
4 episodes of emotional deterioration at the normal work situation under  
5 customary work pressure. (TR 182). Dr. Kikani also assessed that  
6 plaintiff "would have no problem understanding and carrying out simple  
7 instructions." (Id.)

8 In his evaluation, Dr. Kikani noted that plaintiff claimed to have  
9 been sober for three years at the time of the evaluation, but that fact  
10 "needs to be objectively verified." (TR 180). Plaintiff's medical  
11 records indicate that petitioner, who has a 30 year history of abusing  
12 alcohol and heroin (TR 225), went to prison for possession and/or sales  
13 of narcotics sometime after he saw Dr. Kikani and was released from  
14 prison on May 1, 2003. (TR 226, 228; see also TR 243 reporting to Dr.  
15 Linda Smith in October of 2005 that he had been arrested eight times for  
16 possession of narcotics, robbery and possession of a firearm and went to  
17 prison once and was released from prison "about three years ago").  
18 Plaintiff testified that he still drinks alcohol. (TR 276, see also TR  
19 242).

20 The opinion of an examining doctor, even if contradicted by another  
21 doctor, can only be rejected for specific and legitimate reasons that  
22 are supported by substantial evidence, Lester v. Chater, 81 F.3d 821,  
23 830-31 (9th Cir. 1995). "The ALJ can meet this burden by setting out a  
24 detailed and thorough summary of the facts and conflicting clinical  
25 evidence, stating his interpretation thereof, and making findings."  
26 Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595,600(9th Cir.  
27 1999) (citation omitted). Where medical reports are inconclusive,  
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1 “‘questions of credibility and resolution of conflicts in the testimony  
2 are functions solely of the Secretary.’” Id. (citation omitted).

3 While the ALJ did not specifically discuss Dr. Kikani’s opinions in  
4 his March 29, 2003 decision, he considered all the record evidence,  
5 including Dr. Kikani’s report, and incorporated by reference the prior  
6 November 6, 2003 hearing decision. (TR 13). In that decision, the ALJ  
7 summarized Dr. Kikani’s opinions and adopted a residual functional  
8 capacity generally consistent with those opinions, limiting plaintiff to  
9 unskilled work with no frequent public contact. (TR 30,34-35). The ALJ  
10 found that plaintiff had only mild to moderate difficulties in social  
11 functioning based on the fact that he appears to have no difficulties  
12 getting along with his sister and mother. (TR 32). Also significant  
13 was the fact that plaintiff’s medical records did not include evidence  
14 of any episode of decompensation or deterioration of an extended period.  
15 (TR 33). These findings are supported by the record.

16 In the current decision, the ALJ first noted “that the [plaintiff]  
17 has been working for the past two years as an in home support service  
18 worker” making about \$700 per month. (TR 13). The ALJ also considered  
19 plaintiff’s treatment records and the evaluation by consultative  
20 examiner Dr. Linda Smith, who gave plaintiff a mental status examination  
21 on October 18, 2005. (TR 13-14, 239-247). Dr. Smith essentially opined  
22 that plaintiff had no mental disorder other than substance abuse and  
23 that he had no functional impairments. (TR 245-46). In evaluating  
24 plaintiff, Dr. Smith reviewed Dr. Kikani’s evaluation. (TR 239).  
25 However, based on the results of her mental status examination of  
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1 plaintiff, she assessed plaintiff's current GAF score at 80,<sup>3</sup> which  
2 indicates no more than slight impairment in social, occupational or  
3 school functioning. (TR 245). She also raised significant concerns  
4 about plaintiff's credibility and found plaintiff to be only partially  
5 credible. (TR 239-243). In addition, Dr. Smith noted that plaintiff's  
6 reported daily activities include doing household chores, dressing and  
7 bathing himself, going to the store and taking a bus to get around. (TR  
8 243).

9 Accordingly, based on all the evidence before him, including the  
10 evaluations by Dr. Kikani and Dr. Smith and plaintiff's medical records,  
11 the ALJ found that plaintiff's mental problems were due to substance  
12 abuse alone. (TR 13). However, even considering the substance abuse,  
13 the ALJ found that plaintiff could perform basic work functions and  
14 limited plaintiff to simple, routine, repetitive tasks.<sup>4</sup> (TR 14). Thus,  
15 the ALJ's assessment of plaintiff's functional capacity is consistent  
16 with that of Dr. Kikani, who opined that plaintiff "would have no  
17 problem understanding and carrying out simple instructions." (TR 182).

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19 <sup>3</sup>DSM-IV-TR at 34.

20 <sup>4</sup>"An individual shall not be considered to be disabled for  
21 purposes of this title if alcoholism or drug abuse would (but for  
22 this paragraph) be a contributing factor material to the  
23 Commissioner's determination that the individual is disabled."  
24 42 U.S.C. § 423(d)(2)(C). Thus, where there is medical evidence  
25 of drug addiction or alcoholism, the ALJ must decide whether the  
26 plaintiff still would be disabled if the plaintiff stopped using  
27 drugs or alcohol. See 20 C.F.R. § 416.935. If so, the drug or  
28 alcohol abuse is not a contributing factor material to the  
disability and plaintiff is not entitled to benefits. Id.  
However, where, as here, the ALJ determines that, even  
considering the drug and alcohol use, the plaintiff is not  
disabled, then no analysis of the effects of drug addiction or  
alcoholism is required. See 20 C.F.R. § 416.935(a)

1 Even assuming that Dr. Kikani's assessment that plaintiff had a  
2 "current" GAF of 50 indicates greater limitations, the ALJ gave specific  
3 and legitimate reasons for rejecting such limitations, namely, the  
4 plaintiff's demonstrated ability to perform substantial services in  
5 caring for his mother for the past few years **and getting paid by the**  
6 **State of California** to do so, and the findings and credibility  
7 observations of Dr. Smith, who reviewed Dr. Kikani's report. (TR 13-15).  
8 See Morgan v. Comm'r, 169 F.3d at 601-02 (ALJ properly discounted  
9 opinion of treating doctor where, among other things, plaintiff's daily  
10 activities contradicted the doctor's assessment of "marked" limitations  
11 and the doctor's opinion was contradicted by the testifying medical  
12 expert); see also Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.  
13 2001) (where ALJ properly discounted plaintiff's credibility, ALJ was  
14 free to disregard doctor's report, which was based on plaintiff's self-  
15 reporting).

16 The ALJ's consideration of Dr. Kikani's opinions is supported by  
17 substantial evidence and free from material error.

18 B. VE Hypothetical

19 Plaintiff also contends that in failing to comment upon Dr.  
20 Kikani's report, the ALJ failed to give the VE a complete hypothetical  
21 listing all plaintiff's limitations.

22 The hypothetical that the ALJ posed to the VE contained all of the  
23 limitations that the ALJ found credible and supported by the record.  
24 Accordingly, the ALJ's reliance on the testimony given by the VE in  
25 response to that hypothetical was proper. Bayliss v. Barnhart, 427 F.3d  
26 1211, 1218 (9th Cir. 2005). As discussed above, the ALJ's consideration  
27 of the opinions of Dr. Kikani was free from material error and supported

1 by substantial evidence.

2 Plaintiff further contends that the VE's testified that he was  
3 capable of performing jobs that, accordingly to the requirements for  
4 those jobs in the Dictionary of Occupational Titles ("DOT"), exceed  
5 plaintiff's assessed capabilities.

6 The DOT "is not the sole source of admissible information  
7 concerning jobs.'" Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir.  
8 1995). An ALJ "may take administrative notice of any reliable job  
9 information, including . . . the services of a vocational expert." Id.  
10 "[A]n ALJ may rely on expert testimony which contradicts the DOT, but  
11 only insofar as the record contains persuasive evidence to support the  
12 deviation." Id.

13 Here, the VE testified that, considering the limitations in the  
14 ALJ's hypothetical, which included the limitation to simple routine  
15 repetitive tasks and unskilled entry level work, there were in excess of  
16 ten thousand jobs available in the regional economy. (TR 285). The VE  
17 gave the following examples of available jobs that meet the criteria of  
18 the ALJ's hypothetical: "various types of assemblers . . . hand  
19 packagers, sorters and graders in the garment industry . . . primarily  
20 in manufacturing and bundlers in the garment industry." (Id.) The VE  
21 testified that these jobs could be learned by simple demonstrations  
22 within 30 days. (Id.)

23 Plaintiff cited a few examples of DOT descriptions for jobs from  
24 those categories that require a longer training period. However, many  
25 jobs in these categories require, as the VE testified, only a month's  
26 training period. See, e.g., DOT No. 706.687-010 (assembler, production  
27 (any industry)); 789.687-146 (remnant sorter(textile)); 920.587-018

1 (packager, hand (any industry)).

2 Plaintiff also notes that the DOT descriptions for many of those  
3 jobs require a reasoning level of 2, which plaintiff contends is beyond  
4 his assessed abilities. A reasoning level of 2 requires the worker to  
5 "apply commonsense understanding to carry out detailed but uninvolved  
6 written or oral instructions" and "deal with problems with involving a  
7 few concrete variables in or from standardized situations." DOT,  
8 Appendix C, Scale of General Education Development. This is not  
9 incompatible with simple, routine, repetitive work. See Meissl v.  
10 Barnhart, 403 F.Supp.2d 981, 984 (C.D. Cal. 2005) (plaintiff, whose RFC  
11 limited her to simple tasks performed at a routine or repetitive pace,  
12 was able to perform jobs listed in DOT with a reasoning level score of  
13 2).

14 The ALJ's reliance on the VE's testimony is supported by  
15 substantial evidence and free from material legal error.

16 C. Lay Testimony

17 Plaintiff contends the ALJ erred, and failed to comply with the  
18 directive of the Appeals Council's remand order, by failing to properly  
19 consider the statements of plaintiff's sister.

20 In determining whether a plaintiff is disabled, an ALJ must  
21 consider lay witness testimony concerning a claimant's ability to work.  
22 Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1053 (9th Cir. 2006).  
23 However, if the ALJ wishes to discount the testimony of a lay witness,  
24 the ALJ need only give reasons germane the witness for discrediting it.  
25 Bayliss v. Barnhart, 427 F.3d at 1217.

26 Here, the ALJ considered the unsworn statements and letter  
27 submitted by plaintiff's sister. (TR 15). The ALJ disregarded the  
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1 sister's statements for two reasons. First, the ALJ found that  
2 plaintiff's sister "has an obvious family motive in obtaining public  
3 financial support for her brother." (Id.) This is a reason germane to  
4 the witness and is an appropriate basis for discounting her testimony.  
5 Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006) (ALJ did not err in  
6 rejecting lay testimony of plaintiff's former girlfriend in part due to  
7 her "close relationship" with plaintiff and that she was "probably  
8 influenced by her desire to help [him]"). In addition, the ALJ found  
9 that plaintiff's sister's allegations were unsupported by medical  
10 records establishing a residual functional capacity any less than that  
11 assessed by the ALJ. (TR 15). Inconsistency with the medical evidence  
12 is a proper basis for rejecting lay testimony. Bayliss v. Barnhart, 427  
13 F.3d at 1218. Plaintiff's sister's statements that plaintiff's mental  
14 and physical impairments preclude him from working (TR 127-39, 169) are  
15 inconsistent with the medical evidence. (See 182, 187, 245).

16 The ALJ's consideration of the testimony of plaintiff's sister is  
17 supported by substantial evidence and was not error.

18 D. Treatment History

19 Finally, plaintiff contends that the ALJ erred in relying on the  
20 fact that plaintiff has "received very little treatment in the past few  
21 years, suggesting that his alleged impairments are not particularly  
22 severe," (TR 15), because plaintiff testified that he stopped going to  
23 a behavior center in Rialto for his mental health problems because he  
24 could not afford it. (TR 279).

25 The Ninth Circuit has "proscribed the rejection of a [plaintiff's]  
26 complaints for lack of treatment when the record establishes that the  
27 [plaintiff] could not afford it." Regennitter v. Comm'r of Soc. Sec.

1 Admin., 166 F.3d 1294, 1297 (9th Cir. 1999). Here, although plaintiff  
2 testified that he could not afford further treatment at the behavior  
3 center in Rialto, he also testified that he is receiving \$700 a month  
4 for taking care of his mother. (TR 273). Moreover, the record does not  
5 indicate that he attempted to obtain any other treatment or that he  
6 sought out treatment previously. Instead, plaintiff initially sought  
7 treatment because his attorney told him to go. (TR 278).

8 In any event, in the statement quoted in plaintiff's brief, the ALJ  
9 was referring to plaintiff's minimal treatment for his physical  
10 conditions, not his mental impairment. Plaintiff presented no evidence  
11 that he could not afford treatment for his physical conditions - he, in  
12 fact, did receive treatment. (TR 170-78). Moreover, the ALJ's residual  
13 functional capacity assessment was based on the medical evidence,  
14 including the consultative examiner's report and plaintiff's treatment  
15 records, not simply a lack of treatment.

16 Similarly, with respect to plaintiff's mental limitations, the ALJ  
17 based his assessment on the medical evidence of record, including the  
18 reports of the consultative examiners and plaintiff's treatment records.  
19 In considering the credibility of plaintiff's alleged limitations, the  
20 ALJ noted that plaintiff's current treatment was "non-existent," but  
21 also found that plaintiff was already performing substantial work on a  
22 regular basis as an in home service provider for his mother and that any  
23 alleged limitations in excess of those found by the ALJ were not  
24 supported by medical evidence. (TR 15).

25 Accordingly, the ALJ did not materially err in referring to  
26 plaintiff's minimal treatment and the ALJ's decision is supported by  
27 substantial evidence.

1 CONCLUSION

2 If the evidence can reasonably support either affirming or  
3 reversing the Commissioner's conclusion, the court may not substitute  
4 its judgment for that of the Commissioner. Flaten v. Secretary of  
5 Health and Human Services, 44 F.3d at 1457.

6 After careful consideration of the record as a whole, the  
7 magistrate judge concludes that the Commissioner's decision is supported  
8 by substantial evidence and is free from material legal error.  
9 Accordingly, it is ordered that judgment be entered in favor of the  
10 Commissioner.

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12 DATED: December 21, 2006

13 CAROLYN TURCHIN  
14 CAROLYN TURCHIN  
15 UNITED STATES MAGISTRATE JUDGE  
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